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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi-2, the 13th February 1957.

S.R.O. 533.—In continuation of the Election Commission's notification No. 82/28|64|6552, dated the 21st April, 1956 (S.R.O. 1123) published in the Gazette of India, Extraordinary, Part II, Section 3, dated the 14th May, 1956, under Section 106 of the Representation of the People Act, 1951 (XLIII of 1951), the Election Commission hereby publishes the judgment of the High Court of Judicature at Madras, delivered on the 26th November, 1956, on Writ Petition filed by Dr. A. Sreenivasan, Honorary Physician, General Hospital, 22-A, Cathedral Road, Madras, against the final order of the Election Tribunal, Madras, dated the 16th April, 1956 in the election petition No. 28 of 1954.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Monday, the twenty sixth day of November, one thousand nine hundred and fifty six.

PRESENT

The Honourable Mr. Justice Rajagopala Ayyangar.

WRIT PETITION No. 476 OF 1956

Dr. A. Sreenivasan—*Petitioner.*

Vs.

1. G. Vasantha Pai

2. The Election Tribunal Madras by its Chairman

3. The Chief Judge of the Court of Small Causes, Madras—*Respondents.*

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari*, calling for the record in Election Petition No. 28 of 1954 from the 2nd and 3rd Respondents and the order therein, dated 16th April, 1956, and quash that portion of the order, so far as it relates to the finding under Section 99 of the Representation of the People's Act, 1951, that the petitioner is guilty under Sec. 123(7) of the Act.

ORDER: This petition coming on for hearing on Wednesday the 14th and Thursday the 15th days of November 1956 upon perusing the petition and the affidavit filed in support thereof and the order of the High Court, dated 25-4-1956 and made herein, and the counter-affidavit, and the other papers material to this application and upon hearing the arguments of the Advocate-General and Mr. V. P. Raman, advocate for the petitioner, and of Mr. A. Narayana Pai, advocate for the 1st Respondent, and notice to 2nd Respondent having been dispensed with and the 3rd Respondent not appearing in person or by Advocate, and having stood over for consideration till this day, the Court made the following,

ORDER

The jurisdiction of the Election Tribunal, Madras to name the petitioner under Section 99 of the Representation of the People Act, (herein after called the Act) as guilty of a corrupt Practice under Section 123(7) of the Act is canvassed in this petition under Article 226 of the Constitution. The petitioner, Dr. Srinivasan, was one of the two candidates, the other being Dr. V. K. John declared elected to the Madras Legislative Council from the Graduates Constituency in a bye-election to that body held in April 1954. The first respondent G. Vasantha Pai who had also stood for election was one of the unsuccessful candidates in that election Mr. Vasantha Pai filed an election petition E.P. No. 28 of 1954 against both the elected candidates, the petitioner being the second respondent, on various grounds alleging *inter alia* that the returned candidates were guilty of illegal and corrupt practices. The prayers in his petition were contained in paragraph 18 and the principal reliefs sought were two, with an auxiliary relief contained in paragraph (c). This paragraph ran "The petitioner, therefore, prays for an order:

(a) declaring the election to be wholly void,

(b) declaring the election of both the returned candidates as void,

(c) giving a finding that the first respondent has been guilty of the corrupt practices specified in paragraphs 8, 9(a) and 11 and illegal practice specified in paragraph 12 of the petition and the respondent has been guilty of the corrupt practices specified in paragraphs 8, 9(a) and 11 and illegal practice specified in paragraph 12 of the petition and the respondent has been guilty of the corrupt practices specified in paragraphs 8 and 11 of the petition. Paragraph 8 relates to a charge of undue influence and this is not relevant at the present stage. In paragraph 11 the election petitioner stated that the returned candidate had incurred or authorised the incurring of expenditure in excess of the amount prescribed under the Act and had violated the provisions thereof and consequently had committed a major corrupt practice specified in section 123(7) of the Act. Section 123(7) classified as a major corrupt practice the incurring or authorising by a candidate or his agent of expenditure or the employment of any person by a candidate or his agent in contravention of this Act or of any rule made thereunder.

The Election Commission constituted a tribunal and referred the petition to it for enquiry and disposal. After he was served with notice of the petition, the present petitioner, Dr. Srinivasan, raised a question that the relief sought in prayer (b), that is the declaration of the election of the returned candidates as void was barred by limitation under rule 119 of the Election Rules. The tribunal rejected this contention and held that the petition was in time in regard to all the reliefs. Against this decision of the tribunal, Dr. Srinivasan filed W.P. No. 719 of 1954 questioning the correctness of the tribunal's interpretation of Rule 119. I disposed of the writ petition and I upheld the order of the Tribunal. Dr. Srinivasan filed an appeal against my judgment W.A. No. 26 of 1955 and my judgment in this respect was reversed and the bench held that the prayer contained in paragraph 18(b) was out of time and directed the issue of a writ of prohibition to the tribunal not to proceed with the trial of the election petition in so far as relief (b) in paragraph 18 of the petition was concerned. The petition was proceeded with before the tribunal in this truncated form. A question was immediately raised as to whether the tribunal had jurisdiction to deal with prayer (c). The contention on the part of Dr. Srinivasan and also of Dr. John was that the corrupt practice charged could have relevance only to the relief in paragraph (b) and that the tribunal would in view of the decision in W.A. 26|55 have no jurisdiction to enquire into or adjudicate upon whether the returned candidates were guilty of corrupt practices. The tribunal, however, overruled this objection holding that the prayer (c) was an independent relief which the petitioner was entitled to invoke on public grounds and

it was not dependent on the possibility of the tribunal setting aside the election of the returned candidates if the corrupt practice were proved Both Dr. John as well as Dr Srinivasan invoked the jurisdiction of this court under Article 226 of the constitution for the issue of a writ of prohibition against the tribunal from proceeding further in the matter. Both these petitions were heard together by Balakrishna Iyer, J and the learned Judge dismissed these petitions agreeing with the view of the tribunal as to the extent of their jurisdiction to determine whether the returned candidates were guilty of corrupt practice or not Dr John filed an appeal against the dismissal of his petition but Dr Srinivasan did not The appellate court admitted this writ appeal Dr. John did not, however, obtain any stay pending hearing of his writ appeal against the judgment of Balakrishna Iyer, J The result was that the tribunal proceeded with the enquiry and in regard to both the returned candidates it held that there were no grounds for holding that the election was void, as a whole The prayers contained in paragraph 18(a) were, therefore, rejected In regard to paragraph (c) the Tribunal held that Dr. Srinivasan should be taken to have incurred an expenditure of more than Rs. 3,000 which was the maximum prescribed by the rules under the Act with the result he was held guilty of a major corrupt practice under Section 123(7) of the Act and was named under Section 99 of the Act Though the tribunal did not grant the relief of setting aside the election under paragraph 18(b) the result of their finding Dr Srinivasan guilty of a major corrupt practice under Section 123(7) of the Act was that he became disqualified for membership to the Legislative Council under Section 140(1) of the Act A similar finding was recorded against Dr John also with the result that he too became disqualified for membership to the Legislative Council. Against these orders of the tribunal naming the two returned candidates as guilty of corrupt practices both Dr Srinivasan and Dr John filed petitions to this court for the issue of a writ of certiorari to quash the orders of the Tribunal on the ground of lack of jurisdiction and also on the ground that the order was vitiated by apparent error W P No 476 of 1956 now before me is filed by Dr. Srinivasan. The writ petition filed by Dr John was, however, heard by a bench Why that happened was this I have mentioned that Dr John had filed an appeal against the judgment of Balakrishna Iyer, J dismissing his petition for the issue of a writ of prohibition, raising the contention that the relief under paragraph 18(c) of the petition was merely an auxiliary one to the substantial prayers in paragraph 18(b) and that when this main relief became impossible the relief in paragraph (c) could have no independent existence and could not, therefore, be dealt with The writ petition filed from the order of the tribunal by Dr John was posted for hearing along with his writ appeal and they have been heard together The hearing of the present writ petition before me was adjourned in order that the result of the proceedings before the bench might be known The bench has finally set aside the order of the tribunal on the ground that it had no jurisdiction to enquiry into the allegations as to corrupt practices contained in the petition and has, therefore, quashed the order of the tribunal. The learned Judges have also held that Balakrishna Iyer, J., was not right in holding that the tribunal had jurisdiction to proceed with the enquiry as regards the corrupt practice It is in this situation that the present writ petition comes up before me

Two contentions were raised by the learned Advocate-General who appeared for Dr. Srinivasan The first was that the tribunal had no jurisdiction to enquiry into or adjudicate upon the corrupt practice which it has found and secondly that the decision of the tribunal holding that Dr Srinivasan had incurred an expenditure of more than Rs 3,000/- was vitiated by a patent error in the construction of the relevant statutory provisions

It is not disputed by the learned counsel for the respondent Vasantha Pai that the bench has explicitly decided that as a result of the relief in paragraph 18(b) being out of time, the tribunal had no jurisdiction to enquire into or adjudicate upon the returned candidates having been guilty of corrupt practice set out in the petition and in particular the corrupt practice found by it It is beyond dispute that this judgment is as a decision binding upon me and I would have to hold similarly as regards the jurisdiction of the election tribunal to name Dr Srinivasan and set aside its order.

It was, however, contended by Mr Narayana Pai learned counsel for the respondent that this result would not follow because Dr Srinivasan field no appeal from the judgment of Balakrishna Iyer J, but had allowed that judgment to become final. It was, therefore, urged on the analogy of the principle of the *res judicata* that Dr Srinivasan was precluded from raising any plea as to the jurisdiction of the Election Tribunal to proceed with the matter but that the order of Balakrishna Iyer, J., should be treated as a decision in the course of the proceeding which having been allowed to become final could not be

challenged at a later stage. For this position learned counsel relied on the analogy of the decision of the Privy Council in *Ram Kripal V. Rup Kuari* (1) and *Hook. V. Administrator General of Bengal* (2). I am, however, clearly of the opinion that the principle of *res judicata* has no application to the present case as according to the decision of a bench of this court, the tribunal had no jurisdiction to enquire into the corrupt practice set out in the election petition, and in my opinion the refusal of Balakrishna Iyer, J., to issue the writ of prohibition did not vest any further jurisdiction on it. The essence of *res judicata* is that the decision which is invoked as a bar is that of a competent court. It is not disputed that if there were an inherent lack of competency this deficiency could not be made good by consent. If express consent cannot confer jurisdiction the decision of a court *in invitum* stands on no higher footing, nor does it make any difference that such decision is confirmed on appeal. The present case is not one to which section 11 of the Civil Procedure Code directly applies but what is invoked is only the principle underlying it. If section 11 of the Civil Procedure Code requires as its essential basis that the court deciding the first matter must be a competent one the extension of section 11 must also attract a similar condition. I do not consider it necessary to cite authority for such an obvious position but I might as well refer to two decisions of this court which recognised and enforced such a principle. *Chinnappa Reddi. v. Official Receiver, Guntur* (3) and *Rajah Kotagiri, Madhava Rao Bahadur v. Papayya Rao* (4) King J., who delivered the judgment of the bench in *Chinnappa Reddi v. Official Receiver, Guntur* (3) after referring to the decision in *Subba Rao v. Perumal Reddi* (5) distinguished that ruling by observing "that the doctrine of *res judicata* does not apply to questions of jurisdiction". Possibly a better illustration is found in a passage in the judgment of Leach C. J., in *Sri, Rajah Kotagiri Madava Rao Bahadur v. Papayya Rao* (4) where the learned Chief Justice observed as follows: "It is said on behalf of the plaintiff that the decrees passed in the previous rent suits against the defendant in themselves operate as *res judicata*. This contention is manifestly fallacious. As the Revenue Court had no jurisdiction to entertain those suits the decrees passed therein must be treated as nullities and the same remark, applies to the decree of the District Judge in the appeal from the decree of the Revenue Court ..... An appellate decree confirming a decree which is passed without jurisdiction can have no more validity than the decree of the first court. The fact that the decree in S.S.No. 90 of 1937 was .passed *ex parte* also makes no difference.". This passage shows that the confirmation by an appellate court which is the utmost that could be claimed for the judgment of Balakrishna Iyer, J. imparts no more jurisdiction to the election Tribunal than the decision of the Tribunal itself. (See also Maharaja of Jaypore *v.* Gunupuram D. Patnaick) (6). Moreover the point decided by the Tribunal adversely to Dr. Srinivasan and which he brought up before Balakrishna Iyer, J., under Article 226 of the Constitution was an abstract question of its jurisdiction to proceed to enquire into the corrupt practice mentioned in para 11 of the election petition and that was the scope of its adjudication. In my opinion the principle of *res judicata* is wholly inapplicable to such a determination. It was not an adjudication on the legal right of any party but only as regards the power of the tribunal to proceed further with the enquiry.

Learned Counsel for the respondent drew my attention to the judgment of the Supreme Court in *Mohanlal v. Benoy Kishna* (7) where failure to raise objection to the jurisdiction of an executing court was held to preclude the parties from raising any similar objection at a later stage. I do not see how this decision helps the argument. No doubt if the objection were of such a nature that could be waived and that was the foundation of the judgment of the Supreme Court failure to raise objection at one stage would preclude the party from raising it at a later stage but if the objection were such that it could not be waived and the present one is of such a character. I do not see how either the decision of the election tribunal holding that it had jurisdiction or that of Balakrishna Iyer, J., confirming that view, alters the position or becomes a means of conferring jurisdiction on the election tribunal. Further one cannot lose sight of the fact that the election tribunal is a creation of a special statute possessing no further powers and capable of exercising of no larger jurisdiction than are expressly conferred on it.

In this view I must hold that the election tribunal had no jurisdiction to enquire into the corrupt practice and that the order now impugned is beyond their jurisdiction.

It is consequently unnecessary for me to deal with the second point urged by the learned Advocate General that the tribunal was in error in holding that Dr. Srinivasan had incurred election expenses in excess of the maximum amount

(1) 6. All. p. 269.
(2) 48. Cal. p. 499.
(3) I.L.R. 59. Mad. p. 62.
(4) I.L.R. 1946. Mad. p. 760. =1946 I. M.L.J. p. 287.
(5) 1918. Mad. p. 988.
(6) I.L.R. 28 Mad. 42. P.C.
(7) A.I.R. 1953. S.Ct. p. 65.

prescribed by the rules. The learned Advocate-General pointed out that the British Corrupt Practices Act of 1883 contains a special statutory definition of the expression "Payment and Money" occurring in the relevant provisions relating to the return of election expenses and that the tribunal were in error in relying on passages from the judgments of English courts dealing with what expenses must be deemed to have been incurred by a candidate, without adverting to this basic difference. I must say that I see some force in this argument but as I formed a clear opinion that this writ petition must be allowed on the grounds I have already mentioned, I intimated to the counsel for the respondent that I did not propose to hear him on the second point. I will, therefore, say nothing more about it.

I hold that the order of the tribunal naming the petitioner Dr. Srinivasan and holding him guilty of the corrupt practice under Section 123(7) of the Act is without jurisdiction. The rule will be made absolute and the order of the Tribunal set aside. There will, however, be no order as to the costs in this writ petition.

(Sd.) K. KRISHNAMURTHY,
Assistant Registrar, Appellate Side.

[No. 82/28/64]

By Order,

A. KRISHNASWAMY AIYANGAR, Secy.

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